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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

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ALEXANDER L. STEVAS,
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BAXTER RICE, Individually
and as Director of the Department
of Alcoholic Beverage Control
of the State of California

Petitioner,

v.

EVA REHNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the states under the Twenty-first Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

The petitioner, Baxter Rice, Director of the Department of Alcoholic Beverage Control of the State of California respectfully prays that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 8, 1982.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on June 8, 1982. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the

Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the states under the Twenty-first Amendment.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI, section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

United States Code, Title 18:

§ 1161:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, † 2, 67 Stat. 586."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. section 1331 because the amount in controversy exceeded $10,000 and the controversy arose under the constitution, laws, or treaties of the United States. Jurisdiction was also invoked under 28 U.S.C. sections 2201 and 2202.

Eva Rehner is a member of the Pala Band of Mission Indians and owner and operator of a general store on the Pala Indian Reservation in San Diego County.

Petitioner is the Director of the Department of Alcoholic Beverage Control of the State of California (hereafter, the Department). The dispute arose because Mrs. Rehner wishes to sell distilled spirits at her store and was informed that petitioner would require her to obtain a license from the Department in order to do so.

On February 10, 1977, Mrs. Rehner filed a complaint for declaratory judgment, mandatory injunction, and preliminary injunction. On March 7, 1977, petitioner moved to dismiss or for summary judgment on the ground the Department had the authority to require Mrs. Rehner to obtain a state license under 18 U.S.C. section 1161. Judgment granting the motion to dismiss without leave to amend was filed and entered on May 11, 1977.

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On June 8, 1982, the Court of Appeals reversed and held section 1161 preempted state licensing and distribution jurisdiction over tribal liquor sales in Indian country; accordingly, as long as Mrs. Rehner complied with a tribal ordinance, she was not required to obtain a California license to sell liquor in Indian country. See Appendix, p. 37.

REASONS FOR GRANTING THE WRIT

1. The decision below has addressed an important question of federal law concerning the relationship between the states and Indian tribes regarding the distribution and licensing of alcoholic beverages which should be resolved by this Court.

Deeply ingrained in our history, aside from that turbulent period between 1920 and 1933 when prohibition was in

effect, is state control over the sale and distribution of liquor. Regulation of one sort or another as an exercise of the states' police power exists in all 50 states and the District of Columbia. In California, the people have provided in their Constitution for regulation through licensing. Cal. Const. Art. XX, § 22. Other states such as Washington seek to achieve these goals through a state monopoly system. See generally Title 66 RCW; Appendix pp. 46-47. The Twenty-first Amendment recognizes the vital interests of the states in this area and has increased the power of the state to deal with matters regarding alcoholic beverages. Collins v. Yosemite Park Co. (1938) 304 U.S. 518, 538.

With respect to liquor traffic on Indian lands, Congress for more than 150 years simply prohibited the sale or disposition of liquor to an Indian, or the

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introduction of liquor into Indian country. 18 U.S.C., section 1154. (See Appen. B.) But in 1953, Congress enacted 18 U.S.C. section 1161 which made section 1154 inapplicable provided the act or transaction ". . . is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country. . . ." It is the interpretation of this statute with which this proceeding is concerned.

(1) The Decision Below Raises Significant Problems Concerning the Relationship Between States and Tribes Over Administration of Liquor Traffic

Plainly, section 1161 delegates authority over reservation liquor transactions to both the state and the tribe. The court in United States v.

Mazurie, (1975) 419 U.S. 544, permitted the delegation to the tribes because the tribes held a measure of sovereignty over both its members and its territory. Id., at 557. But states too have at least the same, if not greater measure of sovereignty over the subject matter in territory of an Indian reservation located within their borders, particularly where a state, like California, has been granted civil and criminal jurisdiction over matters pursuant to Public Law 280 (18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a)). See Washington v. Yakima Indian Nation (1979) 439 U.S. 463. Therefore, a state as well as an Indian tribe can be the recipient of congressionally delegated power to regulate transactions on an Indian reservation.

The court below impliedly agreed that a delegation of authority to regulate liquor transactions was made to the states

by section 1161, but construed the statute to allow the state to be nothing more than "the source of law to be applied by the tribal government." Appendix, p. 16. At another point, the court opined ". . . that section 1161 incorporates only state substantive standard and not state licensing and distribution jurisdiction. . ." Appendix, p. 22.

Realistically the result of the court's interpretation of section 1161 is that California, regardless of the plain language of section 1161, regardless of the Twenty-first Amendment to the Constitution, regardless of its historical powers to control matters involving liquor within its borders, and regardless of Congress' intent in Public Law 280 that California assume civil and criminal jurisdiction over tribal matters, lacks any power to protect its citizens, both Indian and non-Indian alike,

from the traditional problems associated with the sale and distribution of liquor if such acts occur in Indian country within its borders. According to the court below, California cannot license Indians who sell liquor on reservations and therefore cannot enforce any of its laws through actions against the licensee, nor can California even bring an action for declaratory or injunctive relief against a tribe to compel it to enforce California standards. (Appen., p. 36.) In other words, the California Legislature may pass laws called "substantive state standards," but California cannot enforce those laws on Indian reservations. Viewed nationally, in addition to 50 states regulating the sale and distribution of liquor, there are now more than 100 tribes which have enacted ordinances legalizing liquor traffic and which now have the exclusive power to

control liquor transactions within their borders. Rev. 217, 219, 227, table 4 (1977).

Surely Congress did not intend, by removing the 150-year-old ban of sales to Indians, that Indian tribes were now to be accorded the exclusive power to engage in the complex regulation of this product. To permit Indian tribes to assume exclusive control over the traffic of alcohol on Indian lands will clearly fragment state control over the importation, distribution, and sale of alcohol. While the states, through their respective elected congressional delegations, have some influence as to how Congress exercises federal powers vis-a-vis the states, no similar constitutional mechanism exists with respect to the actions of Indian tribes. Where, as in the present situation, Congress had delegated its

power, the state vis-a-vis the tribes is entitled to the protection accorded it under the Twenty-first Amendment.

An interpretation of section 1161 which allows both the states and the tribes to enforce their laws is consistent with the wording of the statute and the states' historical role as protector of the public in liquor matters. California is a licensing state. Whether a licensee, or a potential licensee, is an Indian residing on an Indian reservation, or a non-Indian, the law should be the same and the standards the same.

The system created by the court below works against rather than in support of this result. Assuming the tribal government has authority to enact an ordinance governing liquor transactions on its reservations, it must, according to the court, comply with "substantive state

standards." What are "substantive state standards?" Nc definition or any discussion of what is meant by this phrase appears in the court's decision. Which California laws must be followed by the tribe, and who makes this decision -- the states, the federal government, the tribes, or the federal judiciary -- are questions unanswered by this decision.

There are additional unanswered questions. Who enforces substantive state standards? The people of California have declared in their Constitution they expect the Department to carry out its functions to adequately protect them from the traditional problems associated with the unlawful sale of alcoholic beverages. Where alcoholic beverages are sold on Indian lands to non-Indians, or are sold by non-Indian lessees on Indian lands to non-Indians, must the people look now to

the tribes for proper enforcement of the states's substantive standards? If the tribes fail in their responsibility, what then? The court's decision holds the states cannot sue the tribes. And if reliance cannot be placed on the tribes, and the tribes cannot be sued, can the state turn to the federal government to enforce the state's substantive standards?

That the federal judiciary might be drawn into the situation in a very substantial way is not idle speculation. After all, United States v. Mazurie, supra, 419 U.S. 544, was a federal prosecution. If Indian tribes are unwilling or unable to enforce "substantive state standards," a violation of such a standard must either go unpunished or prosecuted in federal court as a violation of section 1154. Thus, a state which detects violations of its substantive state standards must obtain

investigative services from federal agencies, prosecutorial services from a local United States attorney, and the cases must therefore be brought in federal courts. Furthermore, all these problems are compounded when it is recalled there are more than 25 tribes within California which have enacted ordinances pursuant to section 1161. Note, 5 American Law Review 217, table 2, pages 224-227, supra.

If liquor transactions by Indians on reservations were limited to members of the tribe in the same manner military exchanges and officer's clubs limited their transactions to members of the military and dependents, the non-Indian people of a state such as California, might nevertheless be protected. But such is not the case. There is nothing in the Ninth Circuit opinion which limits sales by Indians on reservations to non-Indians nor

does the opinion give any consideration to the matter of non-Indian licensees conducting their business on Indian reservations.

In a heavily populated state like California, Indian tribes are not necessarily located in isolated areas. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one-half of the entire city, with the Indian lands interspersed among non-Indian lands in a checkerboard pattern. Agua Caliente Band of Mission Indians v. County of Riverside 442 F.2d 1184, 1185 (9th Cir. 1971). Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet on Indian land will be non-Indian. Yet on the basis of the Ninth Circuit ruling, it can

now be argued that California is prevented from exercising any control over the number and location of these businesses, and the manner in which these businesses are conducted.

While on the one hand, placing a substantial cloud over California's power to administer its liquor laws as they affect Indian and non-Indian alike, the Ninth Circuit decision on the other hand provides no guidance on how Indian tribes must implement state standards. The effect of this uncertainty extends beyond California and the Pala Reservation. It affects the nearly 300 Indian tribes in this country, every state in which an Indian reservation is located, more than 100 tribes which have legalized liquor transactions, and the non-Indians living on or near reservations which are potential customers of Indian liquor retail outlets. The "exceptional

importance" of the issues raised by this case is shown by the Ninth Circuit's decision to decide the case en banc. Rules of Appel. Proc., rule 35(a). Resolution of these very significant and substantial problems by this Court is necessary.

(2) The Effect of the Twenty-first Amendment on the Judicial Approach to Interpretation of 18 U.S.C § 1161

The Ninth Circuit in this case adopted the approach commonly employed by appellate courts in resolving disputes between Indians and non-Indians. The court noted those cases which require that ambiquities and statutes relating to Indians should be resolved in favor of Indians, and those cases which express disfavor with state jurisdiction over Indian lands. Appendix pp. 7-8, 26. From these premises, the court had but a short step to make to conclude that section 1161 does not confer

on the state's regulatory jurisdiction over on-reservation liquor transactions. What was not considered by the court below, and indeed what is not generally considered in an Indian case, is the constitutional basis for the state's action which precipitated the litigation. In a tax case, for example, the court sets forth the applicable principals governing Indian cases, weighs them against the less compelling features of the state's side, and then resolves the case. See e.g. Bryan v. Itasca County (1976) 426 U.S. 373; Moe v. Salish & Kootenai Tribes (1976) 425 U.S. 463; McClanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164; Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685.

What is significant and indeed novel about this case is that California's effort to impose its liquor regulatory system on Indian reservations within its

borders is that this effort has both constitutional - the Twenty-first amendment - and a statutory - section 1161 -- support. As this Court explained:

> "Both the twenty first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of each other and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324, 332.

This Court has not had occasion to consider the Twenty-first Amendment in light of the provisions which underlie congressional authority over tribal Indians. Compare Collins v. Yosemite Park Company, supra, 304 U.S. at 536-538; United States v. Mississippi Tax Comm'n (1973) 412 U.S. 363, 373-379; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599; Department of Revenue v. James Beam Co. (1964) 377 U.S. 341, 345-346; Hostetter v. Idlewild Liquor Corp., supra.

The constitutional derivation for federal authority over Indian matters is now considered to be the ". . . federal responsibility for regulating commerce with Indian tribes and for treaty making." McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. at 172, fn. 7. As the court there wrote:

> "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (Citation omitted.) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." Id. at p. 172.

The Twenty-first Amendment and section 1161 set the limits of state power. But in finding where that limit is, it is necessary for this Court to resolve this important conflict between the state's authority to regulate liquor transactions within its borders which is stated in

section 1161 and is supported by the Twenty-first Amendment, and the rights of Indians on a reservation to be free from state regulation except where Congress has provided otherwise. It is California's position that Congress has provided otherwise in section 1161, and that position is supported by the plain language of the statute itself, its legislative history, and the Twenty-first Amendment.

Equally unacceptable to the states is the Ninth Circuit's conclusion that if Congress intended to confer on the states' regulatory jurisdiction over liquor traffic on Indian lands, it should have been more specific. See appendix, pages 13, 16, citing Bryan v. Itasca County, supra. In contrast to a case where a state is attempting to exercise some aspect of its general regulatory jurisdiction under 28 U.S.C., section 1360, here California seeks

to exercise a power reserved to it by the Twenty-first Amendment. It is a strange rule of statutory construction which holds that Congress must expressly reserve such right to the states when it delegates its jurisdiction over the subject matter of that right to a non-federal entity. In other words, can Congress by silence confer autonomy on Indian tribes in derogation of a state's express constitutional rights?

Again, this court has not addressed in its previous Twenty-first Amendment cases, the conflict between a state's power under that amendment and the delegation of Congressional authority over Indian matters to a non-federal entity, i.e., the tribes. In short, the conflict is no longer between Congress and the states, it is now between the Indian tribes and the states.

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(3) Completion of the Task of Interpreting Section 1161

Section 1161 exempts sales of alcoholic beverages from the proscription in section 1154 if the sale is in conformity both with state law and a tribal ordinance. In United States v. Mazurie (1975) 419 U.S. 544, this Court considered the effect of a tribal ordinance which required a tribal license. Although the ordinance required both a state and tribal license, and the defendants obtained a state license, they failed to obtain a tribal license and were convicted under section 1154. The Court upheld a challenge to section 1161 on the ground of vagueness regarding the location of the bar, and affirmed Congress' power to delegate to the tribes the power to regulate a liquor business.

The teaching of Mazurie is that a person who seeks to engage in a liquor

business on an Indian reservation must satisfy the requirements of the tribal ordinance and if the tribal ordinance requires a tribal license, then one must be obtained. What the court did not address, or have to address, is whether, if state law also requires a license to engage the liquor business, one must be obtained in order to avoid prosecution under section 11 '. The writ should be granted in this case to permit the Court to complete the important task of construing section 1161.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for writ of certiorari be granted.

Respectfully submitted,

GEORGE DEUKMEJIAN,
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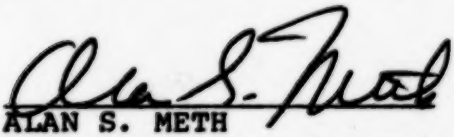
By 
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